THE RIGHT TO REGULATE RAILWAY CHARGES.

A VAGUE notion prevails, even among educated men, that a corporation is in some sort an instrumentality of the Government, and is by its very nature possessed of certain undefined attributes of sovereignty, by virtue of which it has immunities, and may do many acts entirely beyond the reach of an individual. Every day we see railroads commit wrongs that the private citizen would not dare attempt, while the officers of the law, dazzled by the stupendous proportions of the property and labor wielded by these corporations, perform their duty with the cringing servility of a constable who serves a writ upon his king. It is within bounds to say that our modern railroad president, operating three thousand miles of track and working twenty thousand men, all in uniform, labors under the mischievous hallucination that he is part and parcel of the Government, and represents in his person no inconsiderable part of the sovereignty of the State. We propose to correct this pernicious mistake. A simple illustration will remove a wide-spread misapprehension: Suppose that two companies are formed to build a hotel; twenty men associated as a partnership, and twenty other men associated as a corporation,—what is the difference between the powers of the two? It is imperatively necessary to dispel the wild notions prevalent among laymen, and to popularize an accurate conception of what is imported by this term.

Corporate association is simply an improvement upon, and a substitute for, partnership. A corporation is "a body consisting of one or more natural persons, established by law, and continued by a succession of members." The charter is simply a statute, which invests a person with certain six powers called "the corporate faculties"—namely, the power to act by a corpo-

rate name, to have succession, a common seal, etc. As the ancient contentions between the Crown and certain English cities inculcated many principles respecting the immunities and powers of governmental corporations, which principles are entirely foreign to this discussion, it will relieve the confusion to discriminate between public and private corporations. A public corporation *is* an instrumentality of the Government, as a city or town, and every corporation which is not public is private, as lyceums, factories, railroads, etc. It is unnecessary to examine the powers and immunities of a public corporation, because we are only concerned with private bodies, such as lyceum companies, railroad companies, etc.

As soon as we attain a clear-cut idea of what is imputed by the term corporation; as soon as we comprehend that it means simply a body endowed with certain six faculties, not possessed by a natural person, and with these faculties only; as soon as we understand that the mere possession of these six powers constitutes that legal entity called "a corporation," then we are prepared to recognize the bearing and full force of the proposition that if a railroad company has any other immunity or power not possessed by a lyceum, such other immunity or power is due solely to the fact that the legislature has given to it some particular right which is in addition to the corporate faculties. Hence, these private corporations, such as lyceums and factories, which have only the six faculties, are easily separated from those other private corporations, such as bridges, railroads, and ferries, which have the faculties and also certain additional powers. The charter of a company of the first class contains a single clause—a grant of the six faculties; the charter of a company of the second class consists of two distinct parts: (1) a grant of the faculties—namely, a clause creating the corporation; and (2) a clause giving the body so created power to do certain specified acts, which cannot be lawfully done without legislative authority.

It is familiar knowledge that there are many things that the private citizen may not do. He cannot obstruct the highway of a river or blockade a street; but the Government may, and, in fact, often does, give to an individual a right to do one or the other of these acts. Suppose the legislature authorizes a bridge from Washington city to the Virginia shore; as ships could not pass, the Georgetown wharf-owner would be ruined, and ruined

without redress, because the bridge-builder only exercises a power conferred by the Government.* Now, observe the difference between the powers of this bridge-builder and the powers of his neighbor: the latter is not possessed of this right to obstruct the highway. It is obvious that a grant of the common corporate faculties would not authorize this bridge, and it is also obvious that the legislature will give such a right as this as freely to an individual as to a corporation; hence, to simplify the discussion, we observe that an inquiry into the right of the sovereign to regulate railroad charges does not involve a consideration of the corporate faculties, but that the same issue exactly would be presented if the prerogative rights which have been given to railroads had been given to an individual instead of to a corporation; in other words, as regards the question before us, the railroad occupies precisely the status of an individual to whom the Government has given a power to exercise certain of the prerogative rights.

In order, therefore, to determine the powers and immunities of a railroad, we must ascertain the nature, character, and extent of the several prerogative rights with which they are invested; and this requires us to develop a distinction between public and individual property. There is a palpable difference between the property of the Government and the property of the citizen. There are many items of property which belong to the Government—to the people at large, as distinguished from that owned by individuals. We may enumerate, as examples, the right to obstruct a highway—the bed of a navigable river; the right to take private property for the use of the community. The right to take toll is a very valuable and a very common item of public property. And some of these items are of great value. The right to obstruct Broadway with a railroad will sell for more money than any ten thousand acres of land in the valley of Virginia.

This distinction between public and individual property must not be confounded with the difference between ownership by the Government and ownership by a citizen. A horse which belongs to the state is spoken of as public property, and when owned by

* The wharf is valuable only because the owner, confiding in the wisdom and integrity of the legislature, does not believe it will exercise its discretion unwisely or capriciously—does not believe it will authorize the highway to be obstructed.

a citizen, as private property; but it always belongs to the class designated as individual property. So a franchise may become private,—viz., may be owned by a citizen,—but it belongs, none the less, to the class called public property.

It is easy to define with strict accuracy the nature, character, and extent of each one of these several items of public property, because the limits of either of them may be marked out with as much precision as the boundaries of a farm. For example: if we analyze that estate in the Government called the right to obstruct a highway, we readily perceive a very characteristic boundary, or limitation—namely, such a right must be so exercised as will, in the judgment of the sovereign, best attain the objects for which the highway was created; viz., the right is, and must ever remain, subject to be regulated, as to its use, by the sovereign. This continuing governmental control, which, like a division-fence between neighbors, separates public from individual property, is the essential principle of the estate. If it be taken away, the very nature of the estate is changed, and a new and a different estate will be created, which will be a prodigy entirely unknown to our scheme of civil polity.

If we fairly comprehend the nature and extent of this item of public property while it is in the hands of the Government, then we readily understand that its nature and extent are not altered, in the slightest particular, by the circumstance that it has been given to an individual, precisely as the boundaries of the farm remain the same after a sale.

We shall not enumerate the several items of public property; it is sufficient to remark that if a right cannot be legally exercised by a citizen unless and until he first obtains a gift of such right from the Government, and if, after such gift, the right continues subject to the supervision and regulation of the sovereign, then it belongs to the class under consideration.

Waiving an examination of that judicial reasoning which has departed from correct principle and which seems to establish certain conclusions different from the results of this paper, we may remark that many decisions, in apparent conflict with the views here advanced, rest upon a distinction between the acts of the Government as a corporation and its acts as a sovereign.* When the Government buys a horse or makes a contract, it acts

* U. S. *v.* Maurice, 2 Brock., 2 Greenleaf's Cruise, 67.

simply as a corporation; but when it changes the law, or regulates the use of an item of public property which is in the hands of a citizen, it acts as a sovereign. If this dual existence of the Government be fairly comprehended, if its functions in the one capacity be properly distinguished from its functions in the other, we shall not be embarrassed by the proposition that the state, acting as a corporation, may stipulate in regard to its future conduct. In fact, if the subject matter of the stipulation be an item of individual property, the questions which arise are entirely foreign to the present discussion.

We come, then, to inquire which items of public property have been given to railroads, and it is sufficient for our purpose to observe only two of them: (1) the eminent domain and (2) the right to take toll. These estates are entirely distinct and have very different metes and bounds; they have only two characteristics in common: neither can be exercised by a citizen without a special and express grant from the Government, and they are both under the continuing control of the sovereign.

In respect to the eminent domain, it is sufficient to remark that a railroad cannot possibly claim under this franchise any other power than simply a right to acquire *for the use of the community*, against the will of the owner, such private property as is demanded by the public convenience. But let it be always remembered, as a fundamental canon, that not even the sovereign himself can take private property for private use.

This discussion, then, must turn upon an analysis of that ancient and well-known item of public property called the franchise of charging toll—namely, the right to exact a price for the use of property which belongs to the community.

The vulgar mistake is to suppose that a railroad may regulate its charges upon those "business principles" practiced by a citizen in the conduct of his personal affairs. These corporations, of late years, proceed on the radically false assumption that, in exercising this franchise, they are dealing with an item of individual property which is to be managed with an eye single to the pecuniary advancement of the stockholders; whereas, in fact, the road must be conducted and the charges regulated in such a manner as will, in the judgment of the sovereign, best promote the purposes for which it was created—to furnish a convenient means of transportation. The emolument of the corporation must be subordinated to this consideration. The

modern railroad rule is to make the freight as high as the traffic will bear; the legal rule is to make the toll reasonable. It would seem that the railroad officials have an idea that they have purchased from the sovereign a right to distress, oppress—to ruin the community—if, in their judgment, such distress and ruin will enrich the corporation, and that the price paid for this most stupendous right was their obligation to furnish a new (private) road. But this view is based upon two theories, both fundamentally wrong: (1) That the money paid by a customer is a remuneration for the use of private property (whereas it is strictly and emphatically a toll), and (2) that the amount of their charge is to be fixed by stipulation between the corporation and its customer, as individuals bargain about the price of private property. The fallacy of these theories is apparent. It will be carefully remembered that, as regards the matter under discussion, the company stands upon precisely the same footing as an individual common carrier, to whom the Government has given the two franchises of charging toll and eminent domain.

But, to separate each step of this analysis, we observe that a railroad corporation acts in a double capacity. The term railroad involves and presents to the mind two very different things—it is both a highway and a common carrier. A vast deal of confusion has arisen from overlooking this double function of a railroad. As a road, it is subject to the same principles of law as a street or river, and its functions as a highway must be distinguished from its obligations as a carrier. No embarrassment arises from the fact that the same thing is both road and carrier. A turnpike company may run a stage-coach, and we may imagine a turnpike which is not used except by vehicles owned by the company, and in such case the coach and the road taken together would constitute the highway.* It is this uniting in one thing (person ?) two distinct functions that makes up the railroad. For, be it observed, the first scheme was that one company would furnish the road and another the cars.

Now, long before the invention of railroads, the principles of law applicable to carriers, and to highways, and to the franchise of charging toll, were firmly settled and well understood. Not

* An inventor proposes to substitute for pavements "the moving sidewalk." A platform, attached to an endless chain, is to extend the length of a square and be kept in constant motion. This contrivance is both highway and carrier.

only so, but these principles had been frequently applied to canals, bridges, ferries, turnpikes, etc. And we say that it is absolutely impossible to distinguish between those principles and the rules of law which should be applied to railroads. The application is new, but the principles are the same, and the effect of those principles must be the same on railroads that it was on canals, bridges, etc.

A common carrier — viz., a person who prosecutes the business of transportation — is bound to carry, for a reasonable price, every one who offers. He has no more right than his customer to decide what is reasonable, because, if he may make his charge unreasonable, the effect is the same as to give him a right to refuse to carry. The law is, that the carrier shall name his price at his peril; if unreasonable, the customer is entitled to damages precisely as if he captiously refused to carry.* Whether a charge be reasonable is emphatically a judicial question; but, as it is competent for the legislature to furnish to the courts rules of evidence, statutes prescribing the maximum charges for common carriers are regarded simply as a legislative declaration of the amount to be considered as reasonable; namely, the schedule of rates is a mere rule of evidence, and, as a matter of course, subject to the future discretion of the sovereign,† but obligatory upon the courts as a rule of evidence. It is evident that such legislation does not make a contract between the carrier and state that the tariff shall not be changed.

Toll is a charge exacted for the use of property which belongs to the community. A road-bed acquired (taken from its owner) by an exercise of eminent domain belongs to the community. A street which has been dedicated is owned by the public, and every one has precisely the same right to use it that he has to travel, in his own boat, upon a navigable river. We are not perplexed about our right to travel the river, because it was never the subject of private ownership; and yet, after the dedication, as respects the ownership of the community, there is no difference between the river and the street. When he has made a dedication, the original owner has no more interest in the street than a stranger to the title; and this is so, although he acquired the land

* See subject discussed by Green, J. Brown *v.* Adams, 15 West Virginia.

† Such statutes are frequent. Bac. Abr. Carriers, D. Munn *v.* Illinois, 4 Otto.

by a large expenditure of private capital. Every one understands that he cannot erect a toll-gate on a highway without legislative authority, and yet the Government often grants the right to exact toll on a public road. Now, although it is sometimes difficult to determine whether there has been a dedication, yet, in the case of the railroad, there can be no controversy; every fact necessary to establish the dedication is admitted; the single circumstance that the land was acquired by eminent domain is, of itself, conclusive. Hence we have this question: If the legislature grants the right to erect a gate across the Hudson River and take toll from all who pass, and the grantee, at his private expense, erect such gate, whether the schedule of rates mentioned in the statute may be modified by subsequent legislation? It must be remembered such a statute would consist of two clauses: (1) the gift of the franchise and (2) a legislative declaration of the amount of toll to be considered reasonable. Concentrating, then, our attention on this second clause, the discussion is narrowed. The purpose of the clause being to protect the community against excessive tolls, different forms of expression have been employed, and the question is presented whether, in respect to the right of the sovereign to alter the rates at the (supposed) gate across the Hudson, there is a difference between the legal effect of these several forms of expression: "The tolls shall be reasonable";* "The tolls shall not exceed such rates as may be prescribed by the county court"; "The tolls shall not exceed ten cents for a man and five cents for a horse." This question must be answered with reference to the gate on the river; and, if the change of expression does not alter the legal effect,—if the same legislative intent is exhibited in each instance,—then we present the question whether the language, "the tolls shall be reasonable," makes a contract between the state and the grantee that the rates, which happen to be reasonable to-day, shall never be modified?

This point has never been decided. In the present state of the decisions, it is perfectly consistent for the court to hold that the gift of the right to demand toll is a contract, but the schedule is a rule of evidence, and, being such, subject to the discretion of the Government, acting not as a corporation but as

* The language of a grant in 1318, Pim *v.* Curell, 6 Mee. and Wels.; and a similar grant in 1629, Juxton *v.* Thornhill, Cro. Chas. See old cases collected, Stamford *v.* Pawlett, 1 Cromp. and J.; Free Fishers *v.* Gann, 20 C. B. N. S.

a sovereign. Again, the question whether one legislature may tie the hands of another is not involved, because, having determined the limitations which hedge about the estate while held by the Government, we are bound to recognize the same limitations when it is given to a citizen. A controversy about the boundaries of a farm does not involve the question whether the ancestor may bind his heir by a warranty of title.

Then, to bring this inquiry home to the vital issue that now confronts the people of this country, has the sovereign the right (legal and moral) to regulate railroad charges? It is usual for the charter to declare: "It shall be lawful for said railroad company to erect toll-gates every ten miles, and to demand not exceeding ten cents per ton per mile for transporting commodities."* This inquiry must be conducted under the influence of the principle that "grants by the Government are to be construed strictly against the grantee and in ease of the public."† It must be conducted in the light of the historic fact that this power has always been freely exercised over the rates at bridges, ferries, turnpikes, etc., and it must also be conducted in full view of the fact that the same reason, law, and practical necessity apply to the charges of railroads as to those of a common carrier. But there is another consideration which, when the court comes to pass upon this question, will receive particular and special weight: though the grant of the franchise itself be a contract, yet when a railroad charter is construed by the general intent of that legislation which runs back "beyond memory," and by principles aptly called "the fundamentals of the common law," there is nothing of the essence of contract imported by the schedule of rates.

Having reached the conclusion that it is competent for the Government to control the charges of railroads, perhaps it may stimulate intelligent action to suggest, very briefly, the practical application of the views here advanced. The sooner our railroad managers learn to take a correct view of this subject, the better it will be for those interested in the securities of these corporations. As the amount of toll is within the discretion of the sovereign, the aim should be to make that discretion as wise,

* Petersburg R. R. Va. Acts 1830. B. & O. R. R. Va. Acts 1839.

† This maxim is as old as the common law. Charles R. Br. *v.* Warren Br. xi. Pet. & 7 Pick. Perrine *v.* Chespk. C. 9 How. Briggs *v.* Camden, 22 N. J. L.

as intelligent, and as enlightened as possible. The people of this country will never abandon the time-honored doctrine of the common law, that *toll must be reasonable*, and the true danger is that the legislature, not being properly advised, will err in the wrong direction, and, by making the rates unreasonably low, paralyze this important branch of industry. Railroads have far more to fear from honest ignorance than from that enlightened statesmanship which proceeds on the principle that corporate emolument is subordinate to the public welfare; they have far more to fear from demagogues than from statesmen. It is an error to suppose that the millions invested in these works were so invested upon the untenable and mischievous hypothesis that a foolish contract has subjected all the vast industries of this great country to the unrestrained and uncontrollable cupidity of irresponsible monopoly. On the contrary, capital, in this as in other cases, is trusted to the discretion of the sovereign; and unless that discretion is debauched, unless integrity and intelligence are excluded from the public service, the confidence will not be deceived. Hence, railroads should discontinue their efforts to mislead the public mind and to corrupt the ballot-box. The politicians whom they are now using do not deserve, and will never obtain, public confidence, because such men are not actuated by principle, or stimulated by the courage of conviction. But, acting on the theory that the public welfare is the first consideration, they should publish in good faith full and reliable information as to their earnings and expenses, to the end that the people may come to a right understanding of what tolls are reasonable and what are not. There is in this country an undercurrent of conservative reason which is brimful of honesty and good faith, and railroad men must learn to trust it.

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